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No. 519

In the Supreme Court of the United States

OCTOBER TERM, 1957

LUTHER THOMAS LAMBERT, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission, Washington 25, D. C.

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Appellees, United States of America and Interstate Commerce Commission, move, pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, that the final judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on June 20, 1957, by a three-judge court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. This order, dated March 1, 1957, and entered in

Louisville & Nashville Railroad Company et al. Merger, etc., 295 I. C. C. 457, authorized a merger of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company. In the same order, the Commission approved the acquisition of direct control through stock ownership of the surviving corporation by the Atlantic Coast Line Railroad Company, and of indirect control of the surviving corporation by the Atlantic Coast Line Company.[1] There is pending before the Court in *City of Nashville, et al.* v. *United States, et al.*, No. 365, this Term, another appeal from the same judgment. We respectfully refer the Court to the Statement in our Motion to Affirm in that case, which sets forth the relevant facts.[2]

ARGUMENT

Appellees submit that none of the questions raised by the appellants is sufficiently substantial to require further argument.

Appellants state (Juris. St., p. 4, fn. 2) that they adopt the questions presented in the jurisdictional statement of the appellants in No. 365. As to such questions, we respectfully refer the Court to our Mo-

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[1] The Commission found that L. & N. has been controlled through stock ownership since 1902 by the Atlantic Coast Line Railroad Co., which in turn is controlled by the Atlantic Coast Line Company (295 I. C. C. 461).

[2] We note that these appellants filed their notice of appeal in the court below on July 26, 1957, and that the jurisdictional statement was not filed in this Court until September 30, 1957, sixty-six days later. While this is in excess of the sixty-day period provided by Rule 13, we do not take the defect to be jurisdictional. Cf. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 84–86.

tion to Affirm in No. 365. We confine ourselves here to the additional questions set forth in the jurisdictional statement of these appellants.

1. The appellants contend that in authorizing a merger of the two railroads the Commission failed to give proper weight to the interests of the railroad employees who would be affected by the merger (Juris. St. 8–18).

At the outset, we call attention to the appellants' suggestion in their "Question 1" that the Commission acted "under the guise of imposing what are alleged to be (but in actuality are not) liberal protective conditions for the benefit of the carrier employees affected." In its report (295 I. C. C. at 501), the Commission stated that "we will impose the same conditions for the protection of railway employees who may be adversely affected as were set forth in *New Orleans Union Passenger Terminal Case,* 282 I. C. C. 271." The so-called New Orleans conditions were prescribed by the Commission upon further hearing following this Court's remand in *Railway Labor Executives' Association* v. *United States,* 339 U. S. 142. These conditions are set out in the Appendix to this motion. The Commission's further finding that these conditions "are more favorable than any heretofore imposed in merger cases" (295 I. C. C. at 502) has not yet been challenged in this litigation, except as indicated above.

The appellants apparently contend that as a matter of law the Commission could not approve the merger without finding that the adverse effect upon employees would be outweighed by "present gains or

advantages to the public generally in point of service." In its report (295 I. C. C. at 502-503) the Commission summarized its statutory duty, as follows:

> * * * In disposing of transactions filed [under section 5 (2)], we must find, in the light of the considerations, among others, enumerated in section 5 (2) (c), that the applicants' proposal will, subject to such terms and conditions and such modifications as we may find to be just and reasonable, be consistent with the public interest. In passing upon such a merger, we are required by the provisions of section 5 (2) of the act to give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. In administering these provisions we are to be guided primarily by consideration for adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25. The foregoing are the primary elements affecting the public interest with which the transaction must be consistent.

From this, the appellants contend that the Commission erroneously held that the interest of employees must always be subordinated to "consideration for adequacy of transportation service." The appellants

misread both the Act and the Commission's report.

To begin with, the primary test which Section 5 (2) (b) requires the Commission to apply to a proposed merger of railroads is whether it "will be consistent with the public interest." This Court has already held, contrary to appellants' contention, in *Schwabacher* v. *United States*, 334 U. S. 182, 193, that the four factors enumerated in Section 5 (2) (c) are not the exclusive criteria for determining the public interest, but are "considerations, among others" which the Commission must consider. In *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25, this Court held that in Section 5 (2) (prior to the Transportation Act of 1940) "the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, * * *." Following the Transportation Act of 1940, in *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82, 87, this Court stated flatly that the National Transportation Policy "is the Commission's guide to 'the public interest' ", and that under that Policy the Commission must consider "the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy."

Thus, the Act as interpreted by this Court refutes the appellants' contention that the Commission could not approve the merger since it could not find "that any immediate and direct improvement in service will

result from the merger." Rather, it is clear that substantial savings and economies justify approval of a merger notwithstanding adverse effects upon carrier employees.

Even a casual reading of the Commission's report shows that it did not hold that the interest of carrier employees must always be subordinated to other factors. Assuming that insignificant economies and increases in efficiency would not warrant approval of a merger which resulted in serious losses to employees, this is not such a case.

2. (a) The appellants contend that the Commission erred in failing to determine in its order which employees of the two carriers should bear the loss of employment resulting from the merger (Juris. St. 18, *et seq.*).

The Commission noted in its report that "[a]ccording to testimony of the applicants, jobs of approximately 550 employees of the Nashville, Chattanooga & St. Louis would be abolished, and an additional 289 would be transferred; making a total of 839 employees affected by the proposed merger" (295 I. C. C. at 500). By this statement, the Commission merely identified the jobs or positions which would be affected by the merger. Neither in its report nor in the conditions which it imposed for the protection of employees did the Commission purport to determine which employees of the railroads should retain or lose employment as a result of the merger. As counsel for the Commission stated during oral argument in the court below, "the choice as to who is to be laid off is left by law to the managerial discretion

of the carriers as limited by their collective bargaining agreements."

A careful reading of the Jurisdictional Statement, particularly at pages 21–22, suggests that the appellants are cautiously suggesting that the Commission should have required a consolidation of the L. & N. and N. C. & St. L. seniority lists for the purpose of determining which employees should lose jobs. It is not necessary to determine whether or in what circumstances the Commission may so deal with seniority matters in an order issued under Section 5 (2). Cf. *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263 (C. A. 2), certiorari denied, 346 U. S. 826. Seniority is created by contract, and, with all of its ramifications of crafts, seniority districts, etc., is primarily a matter for negotiation and arbitration under the Railway Labor Act. *O'Donnell* v. *Pan American World Airways*, 200 F. 2d 929 (C. A. 2). Nothing in Section 5 of the Interstate Commerce Act, and particularly nothing in Section 5 (2) (f), dealing with protective conditions for employees, remotely suggests that the Commission must determine the basis upon which employees of merged railroads are to be selected for retention or dismissal. The emphasis of Section 5 (2) (f) is upon protection for the "railroad employees affected", rather than upon the determination of who shall be "affected".

The appellants did not produce, in the proceedings before the Commission, the collective bargaining agreements between the two railroads and their employees. Thus, they are in the position of insisting that the

Commission act upon a matter which is usually controlled by collective bargaining agreements, without even knowing the pertinent terms of the agreements. Clearly, the appellants have made no showing that the Commission acted arbitrarily in following its usual course of not prescribing seniority arrangements.[3]

(b) The appellants contend that the judgment of the court below must be set aside because, in sustaining the Commission's order, it did so "upon the express condition that the rights of the employees of the Nashville Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein,

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[3] The appellants further contend that the Commission erred in not making a finding that the "adverse effect" of the merger upon the "employees affected" would be permanent (Juris. St. 22-23). The court below correctly held, in its Conclusion of Law No. 7, that the Commission was not required to make such a specific finding. Moreover, it is clear from its report (295 I. C. C. at 500) that the Commission was aware that at least some of the displaced employees might never regain employment with the merged railroad, and that the railroads' pay for clerical work was higher than the average of other Nashville employers. It is obvious that these factors were considered by the Commission in prescribing favorable protective conditions under Section 5 (2) (f). In any event, this contention was not fairly comprised within the questions stated in appellants' notice of appeal. See Rules 10, paragraph 2 (c), and 15, paragraph 1 (c) (2), of the Revised Rules of this Court.

disclosed in finding of fact Number 15."[4] The court below imposed this condition solely by reason of doubts created by these appellants as to whether the Commission had prescribed that the loss of employment resulting from the merger should fall solely upon the employees of N. C. & St. L. As pointed out above, no such determination was made by the Commission. Accordingly, the condition imposed by the court below is in no way inconsistent with the Commission's order. Since the condition, therefore, is superfluous in relation to the Commission's order, it would appear to be unnecessary to decide whether its imposition was improper under *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17. The appellees are not challenging this aspect of the judgment below, and it would seem that the appellants are wholly without standing to do so.

3. It is contended that the Commission failed to consider the Revised First Sheet of Exhibit H–62 purporting to show that L. & N.'s cost of repairing

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[4] The district court's Finding of Fact No. 15 reads as follows:

"15. Toward the conclusion of a lengthy colloquy concerning the protection of rights of the Nashville, Chattanooga & St. Louis Railway employees, counsel for the Interstate Commerce Commission, Robert W. Ginnane, Esquire, made the statement that the Commission is without power, in connection with a reorganization, to tell carriers who shall or shall not be laid off as a result of the merger. He stated further that the Commission's power and responsibility are limited to specifying protection of those who are laid off, the choice of those laid off being left to the managerial discretion of the carriers as limited by their collective bargaining agreements. The attorney stated, moreover, that the Commission merely identifies positions which would be affected and does not undertake to state what individuals would be affected."

and maintaining diesel locomotives was substantially higher than that of N. C. & St. L., from which they contend, in effect, that the merger application should have been denied because L. & N. could achieve substantial savings in this respect without a merger.

The Commission's report contains the following statement (295 I. C. C. at 493):

> Applicants, on the other hand, contend that it is difficult to compare railroads in the matter of cost of locomotive repairs because of the differences in (1) the types of locomotives, (2) the service in which they are used, (3) horsepower, and (4) the hazards encountered during a particular period; and that the record shows that, while the diesel repair costs of one road were higher than those of the other, the situation was reversed in the case of freight-car repair costs on the bases used.

The quoted statement clearly embodies a recognition by the Commission that L. & N. had higher costs for locomotive repairs. Of course, if L. & N. can effect operating economies in addition to those anticipated from the merger, the public interest will benefit. But the possibility of such other economies can hardly outlaw a proposed merger which will itself result in substantial economies.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

OCTOBER 1957.

APPENDIX

Principal Provisions of Labor Conditions in New Orleans Union Passenger Terminal Case, 282 I. C. C. 271

The conditions prescribed in the New Orleans case are those contained in the so-called Washington Agreement of May 1936 between the various railroad companies and the railway labor organizations, provided, however, that the conditions for protection of employees prescribed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177, were to be applied as a minimum, subject to minor limitations.

The principal protection afforded an employee in the Oklahoma conditions is as follows:

(a) A protective period of 4 years from the effective date of the order in the protection case is prescribed, and if he is displaced in one position and retained in another paying less salary he is paid the difference in the average monthly compensation of the position from which he was displaced and the position in which he was retained from time of displacement to end of protective period. (Condition 4.)

(b) If not retained in any position, he is accorded a monthly displacement allowance equivalent to one-twelfth of the pay received by him in the last 12 months of his employment in which he earned compensation from time of displacement to end of protective period. Such compensation is reduced by wages received from benefits or other employment which he must, with certain limitations, accept if offered. (Condition 5.)

(c) During the protective period he is not to be deprived of benefits attached to his previous employ-

ment such as free transportation, pensions, hospitalization, relief, etc. (Condition 6.)

(d) If required to move his place of residence to accept another position he is reimbursed for all moving expenses for himself and immediate family and for actual wage loss not to exceed 2 days, and is protected against loss sustained by any forced sale of his then present home. (Conditions 7 and 9.)

(e) Matters in controversy to be submitted to arbitration, (Condition 8), except that specific procedures are provided with respect to sale of homes. (Condition 9.)

The Washington Agreement of 1936 established procedures as between carriers and employees for putting a coordination plan or merger into effect. The principal provisions thereof protecting an employee in case of displacement or rearrangement are:

(a) He is to be selected from all carriers involved on bases accepted as appropriate in the particular case, and any assignment is to be made on the basis of an agreement between the carriers and the organizations of the employees affected, or in the event of dispute submitted for arbitration. (Section 5.)

(b) He may not for a period of 5 years from the effective date of a coordination be placed in a worse position with respect to compensation and rules governing his working conditions and if he is forced to accept a job with less pay, he will be paid the difference in the average monthly compensation of the position from which he was displaced and the position in which he was retained. (Section 6.)

(c) If he loses his job he will receive an allowance based on length of service equivalent to 60 percent of his average monthly compensation during the last 12 months in which he earned compensation ranging from a period of 6 months for 1 years service to 60

months for 15 years service. The allowance starts on the date he loses his job. (Section 7.)

(d) He may not be deprived of benefits attaching to his previous employment such as free transportation, pensions, hospitalization, relief, etc. (Section 8.)

(e) If entitled to a coordination allowance he may resign and accept a lump sum separation allowance determined in accordance with a schedule providing for 3 months' pay for 1 year of service ranging upward to 12 months pay for 15 years of service. (Section 9.)

(f) If required to move his place of residence to accept a new job, he is reimbursed for moving expenses for himself and family and his own actual wage loss during time of transfer and not to exceed 2 days' pay for time required to find a place of residence in the new location, and he is protected against loss from a forced sale of his then present home. (Section 11.)

(g) If the carrier rearranges its forces in anticipation of a coordination for the purpose of depriving him of benefits under the agreement, the agreement will apply as of the date he is affected. (Section 12.)

(h) An arbitration committee is provided to settle all such disputes other than the sale of homes for which specific procedure is provided. (Sections 11 and 13.)

Under the New Orleans conditions, the employee has the benefit of both the Washington Agreement and the Oklahoma conditions, but cannot receive less than the protection afforded in those last mentioned. From a compensation standpoint, the Oklahoma conditions provide 4 years complete protection from the effective date of the order except that an employee with less than 4 years service is given compensation

for the length of his previous service, and the Washington Agreement provides, if affected within 5 years from the coordination date, a maximum of 60 percent wage protection from the date he is adversely affected for a specific number of months depending upon the length of service. If adverse effect is not suffered by an employee until 3 or 4 years after the effective date of the order so that he would receive little or nothing under the Oklahoma conditions, he may still be within the period permitting full benefits under the Washington Agreement. However, he cannot receive any of the benefits twice.

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